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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ALDRICH SUPPLY COMPANY, INC.,	
Plaintiff and Appellant,	E039154
v.	(Super.Ct.No. RIC371032)
RICHARD HANKS,	O P I N I O N
Defendant and Appellant.	

APPEAL from the Superior Court of Riverside County. Stephen D. Cunnison, Judge. Affirmed.

Callahan & Blaine and Jim P. Mahacek for Plaintiff and Appellant.

Law Offices of Thomas E. Elenbaas, Inc. and Thomas E. Elenbaas for Defendant and Appellant.

Plaintiff Aldrich Supply Company, Inc. (Aldrich) sells and distributes underground PVC and culvert pipe to the construction industry. Defendant Richard Hanks was the former president of Aldrich. Shortly after leaving Aldrich, Hanks started

a competing business, American Pipe & Geo-Textiles, LLC (American Pipe). Aldrich sued Hanks, alleging that Hanks misappropriated Aldrich's trade secrets and interfered with Aldrich's business relationships.

Hanks moved for summary judgment or, alternatively, summary adjudication of each cause of action. The trial court granted the motion for summary judgment and entered judgment thereon. Hanks filed a motion for attorney fees, which the court denied. Aldrich appealed from the judgment and Hanks appealed from the order denying his motion for attorney fees. We affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. *Background*

Aldrich was founded in 1947. In 1977, Aldrich hired Hanks as a salesman. Hanks, who had been employed in the underground pipe industry since approximately 1966, developed Aldrich's underground pipe business. In 1985, Hanks was promoted to vice-president of Aldrich.

In 1987, Everett Daly purchased Aldrich. The sale to Daly was conditioned upon Hanks's continued employment with Aldrich. On May 5, 1987, Hanks and Aldrich entered into an employment agreement with a term of five years. A draft of the agreement included language that would have restricted Hanks from calling on or soliciting Aldrich's customers following termination of his employment. Hanks objected to this language, and it was omitted from the final agreement. The executed employment agreement prohibited Hanks from disclosing Aldrich's trade secrets, employing any

Aldrich employees, or influencing Aldrich's employees to quit.[1] After the five-year term expired in 1992, the parties did not enter into another agreement.

In 1998, Hanks was promoted to president of Aldrich.

In 2001, problems developed between Daly and Hanks relative to the work performance of Hanks's son, Curt, who also worked for Aldrich. In late November 2001, Daly docked Hanks's salary five percent "as a nominal punishment and continuing reminder of [Hanks's] dishonest behavior and betrayal of [Daly] and others . . . ." (Underlining omitted.)

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[1] The "Non-Disclosure; Non-Competition" provision of the agreement provides: "During the term of employment, EMPLOYEE will have access to and become acquainted with various trade secrets, consisting of formulas, patterns, devices, secret inventions, processes, and compilations of information, records, customer lists, pricing information and specifications (hereinafter 'Confidential Information') which are owned by COMPANY and which are regularly used in the operation of COMPANY'S business. EMPLOYEE shall not disclose any of the aforementioned Confidential Information, directly or indirectly, or use them in any way, during the term of this Agreement. EMPLOYEE shall not, during the term of this Agreement or following the termination of his employment with COMPANY, either directly or indirectly: [¶] (a) Disclose to any person, firm or entity, either directly or indirectly, any Confidential Information disclosed to EMPLOYEE or known by EMPLOYEE as a consequence of or through his employment by COMPANY about COMPANY'S services, processes, including information about COMPANY'S customer lists, accounting processes, and marketing and selling techniques. [¶] (b) Directly or indirectly, or by action in concert with others, for a period of two (2) years from the date of termination of EMPLOYEE'S employment hereunder induce or influence or seek to induce or influence, any person who is employed as an employee, agent, independent contractor or otherwise by COMPANY to terminate his or her employment or engagement, nor employ such person directly or indirectly."

On November 30, 2001, Hanks tendered his resignation, effective December 31, 2001. On December 6, 2001, Daly relieved Hanks of his duties and gave him his final paycheck.

In January 2002, Hanks, with funding from a neighbor, formed American Pipe. American Pipe is a competitor of Aldrich. Both businesses bid on general engineering construction projects, usually involving infrastructure. American Pipe, Aldrich, and more than 20 other businesses regularly bid on the same jobs. Typical projects include road construction, storm channels, storm drain systems, and erosion control.

After its creation, American Pipe subscribed to the "Green Sheet" and the "Blue Book," which are available to the public. Hanks states that he used these publications to identify jobs to bid on and obtain contact information about prospective customers.

B. *Procedural Facts and History*

On February 14, 2002, approximately two months after Hanks's departure from Aldrich, Aldrich filed a complaint for damages and injunctive relief. The complaint alleged four bases for liability: misappropriation of trade secrets; unfair business practices in violation of Business and Professions Code section 17200; intentional interference with economic advantage; and negligent interference with prospective economic advantage. The wrongful conduct supporting each theory was Hanks's alleged misappropriation of Aldrich's trade secrets.

Hanks filed an answer on March 25, 2002, generally denying the allegations of the complaint.

Pursuant to former Code of Civil Procedure section 2019, subdivision (d),[2] Aldrich provided to Hanks the following unverified identification of the trade secrets allegedly misappropriated: "(1) customer contact information, including but not limited to the name, address, telephone number, email address, of Plaintiff's customers including Astelford, ACI, Bali, Don McCoy, Magco, Mesa Contracting, Perry & Shaw, Sukut and Sully Miller, among others; (2) Plaintiff's pricing information and methodologies for its customers; (3) sales history data for Plaintiff's customers concerning their transactions with Plaintiff; (4) invoices and invoice history data for Plaintiff's customers concerning their transactions with Plaintiff; and (5) special requirements for Plaintiff's customers."

On March 24, 2005, Hanks moved for summary judgment or, in the alternative, summary adjudication of each cause of action. Hanks argued that Aldrich had failed to identify any trade secret entitled to protection, and that he had not used any trade secret or proprietary information in the course of his employment with American Pipe. He further argued that each of Aldrich's four causes of action are derived from the allegations of misappropriation of trade secrets and, therefore, that he is entitled to

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[2] Code of Civil Procedure section 2019, subdivision (d) provided, at the time of Aldrich's identification of the alleged trade secret: "In any action alleging the misappropriation of a trade secret under the Uniform Trade Secrets Act (Title 5 (commencing with Section 3426) of Part 1 of Division 4 of the Civil Code), before commencing discovery relating to the trade secret, the party alleging the misappropriation shall identify the trade secret with reasonable particularity subject to any orders that may be appropriate under Section 3426.5 of the Civil Code." This section and subdivision was renumbered in 2004, without change in the text, as Code of Civil Procedure section 2019.210.

summary judgment. Hanks supported the motion with his declaration and certain documents, including his employment agreement with Aldrich.

In opposition to the motion, Aldrich argued that its customer list and related information were protectable trade secrets and that Hanks misappropriated this information when he solicited Aldrich's customers. Aldrich supported its opposition with declarations by Daly, Robert Doty, Gavin Praejean, and Marc Miles, and numerous documents.

Hanks filed written objections to portions of each of the declarations and to some of the documents submitted by Aldrich.

Following a hearing on the motion, the court sustained each of Hanks's evidentiary objections and granted the motion for summary judgment.

After the entry of judgment, Hanks moved for an award of attorney fees based upon a contractual attorney fees provision in the employment agreement. Following a hearing, the court denied the motion.

On appeal, Aldrich contends that the trial court erred in sustaining the objections to its evidence. Aldrich further contends that the trial court's analysis and factual findings are erroneous. With respect to the merits of the motion for summary judgment, Aldrich argues, as it did below, that its customer information constituted a protectable trade secret, which Hanks misappropriated by soliciting its business. We hold that, with one exception, the trial court did not abuse its discretion in sustaining Hanks's objections and that, based upon the admissible evidence, Hanks is entitled to judgment as a matter of law.

ANALYSIS

A. *Hanks's Motion for Summary Judgment*

1. Standards of Review

"The purpose of a motion for summary judgment is 'to discover whether the parties possess evidence requiring the fact-weighing procedures of a trial. [Citations.]'" (*City of Oceanside v. Superior Court* (2000) 81 Cal.App.4th 269, 273.) A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision to grant summary judgment de novo, "considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) "The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling, not its rationale." (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.)

"A motion for summary judgment must be decided on admissible evidence in the form of affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice may be taken. [Citation.] . . . [¶] 'Personal knowledge and competency must be shown in the supporting and opposing affidavits and declarations. [Citations.] [¶] 'The affidavits must cite evidentiary facts, not legal conclusions or "ultimate" facts. [Citation.] [¶] 'Matters which would be excluded under the rules of evidence if proffered by a witness in a trial as hearsay, conclusions or

impermissible opinions, must be disregarded in supporting affidavits. [Citation.]'" (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1119-1120.)

2. Evidentiary Rulings

Aldrich argues that the trial court erroneously sustained Hanks's objections to the declarations and certain documents supporting the opposition to the motion for summary judgment.

We do not disturb evidentiary rulings made by the trial court in connection with a motion for summary judgment in the absence of an abuse of discretion. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694; *Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169.) The trial court's discretion is an impartial discretion, guided and controlled in its exercise by fixed legal principles. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1066.) Such discretion is abused when it is exercised in a capricious or arbitrary manner, or the ruling exceeds the bounds of reason. (*Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 285.)

Aldrich contends that the trial court, in making discretionary evidentiary rulings relative to affidavits and documents submitted by a party opposing summary judgment, must exercise its discretion in favor of allowing such evidence. Aldrich bases this argument on the rule that the evidence submitted by a party opposing summary judgment must be liberally construed. (See, e.g., *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838-839.) Aldrich further argues that the test for appellate review of discretionary evidentiary rulings excluding evidence by a party opposing summary judgment is not whether the trial court acted reasonably in excluding evidence, but

whether the trial court would have acted reasonably if the court had allowed the evidence in. This test would appear to turn the deferential abuse of discretion rule on its head. A ruling, though clearly reasonable, would, if Aldrich's test is adopted, be reversed if a contrary ruling would also have been within the bounds of reason. Aldrich offers no citation to any decision applying such a rule and we decline to adopt it here.

Unless otherwise noted, Hanks's objections were based on lack of foundation and speculation. The specific reasons for sustaining the objections do not appear in the record.

(a) *Declaration of Everett Daly*

Daly provided the following facts to which there was no objection: "I am the sole owner of Aldrich Supply Company, Inc., and have been since 1987. I oversee the operations of the company by, inter alia, reviewing invoices, purchase orders, financial statements, costs, and all other aspects of the company. I usually visit the company's office several times per week and keep in constant contact with the person in charge on an almost daily basis. [¶] . . . [¶] . . . Aldrich Supply Company was founded in 1947. I bought the company in 1987. [¶] . . . At the very core of the company's viability and lifeline is its customer base. Over the years, Aldrich Supply has spent countless amounts of time, energy and money in developing and maintaining its customer list and contact information. It has done so by making sales calls, visiting job sites, developing relationships with key individuals within Aldrich's customer's companies, sending out mailers, advertising, subscribing to trade publications, and conducting research about projects, job sites, and new companies entering the market. [¶] . . . By Aldrich's

creativity, ingenuity, investments and sheer man hours, it has developed a core customer base which supports the majority of the company's sales. While there is a much larger number of potential customers out there, Aldrich has winnowed down the list of customers it chooses to target, since those customers have been time-tested and proven to be the most profitable for Aldrich Supply. [¶] . . . All of the information about Aldrich's customers, which it has labored to develop over the years, was entrusted to Richard Hanks, as Aldrich's former president. [¶] . . . Defendant Hanks had worked for Aldrich for approximately 24 years, during which time he learned the identity of Aldrich's customers, their contact information, key personnel at each of Aldrich's customers with whom to deal, Aldrich's pricing information and methodologies, sales history data for Plaintiff's customers, invoice information and invoice history data for Aldrich's customers, and the special requirements requested by Aldrich's customers."

The following are the portions of Daly's declaration to which objections were sustained, and our evaluation of the court's rulings. (We italicize the objected to portions of the respective declarations.)

"Paragraph 9. . . : *'Richard Hanks committed this confidential information to his mind or memory, and thus took the information with him when he left Aldrich.*'" The trial court properly sustained Hanks's objection to this statement. Daly proffered no foundation upon which he could competently state that Hanks committed to his mind or memory the specified "confidential information." Daly is merely speculating as to what was in Hanks's mind or memory. Additionally, while Daly described a number of items that Hanks allegedly committed to his "mind and memory," there is nothing presented in

the unobjectionable portion of Daly's declaration to support his conclusion that the described information was confidential and kept secret from others or not generally known in the industry.

"Paragraph 10. . . : '*During the 24 years that Richard Hanks worked at Aldrich Supply Company, he developed a formula and method of pricing jobs to make the company profitable.*'" While reasonable minds could differ as to the admissibility of this statement, it cannot be said that the trial court abused its discretion in sustaining the objection. Nowhere does Daly identify the particular formula or pricing methods. He does not state that he was personally involved in the development of the formula or pricing methods; nor does he state how he acquired the knowledge that Hanks developed a formula or pricing methodologies. Personal knowledge must be demonstrated. (*Guthrey v. State of California, supra,* 68 Cal.App.4th at pp. 1119-1120.) Additionally, the declaration must set forth evidentiary facts, not ultimate conclusions. (*Ibid*.) The trial court could reasonably find both aspects lacking in Daly's statement.

"11. *Richard Hanks also knew the special needs or requirements for Aldrich's customers. For example, Hanks knew that a company like Astleford Construction would primarily order perforated pipe, while C.P. Construction would order pipe fittings, while Magco Drilling would order corrugated steel pipe, while ACI would place more diverse orders for perforated pipe, metal fabrication work, slotted pipe, Typar filter fabric, grids, pipe fittings, corrugated steel pipe, and high density polyethylene pipe.*" These statements are unsupported by sufficient foundation, and are based upon speculation. Daly has not shown that he is qualified to opine as to Hanks's knowledge.

"13. *In addition, Aldrich Supply Company has protected its confidential information by creating a culture of confidentiality and secrecy concerning this information. Aldrich Supply Company installed a very elaborate and sophisticated security system at its offices, which not only provided monitored alarms for the doors and windows, but also a motion detector for the outside areas surrounding its yard.*" Hanks objected to these statements as vague, ambiguous, conclusionary, and irrelevant. From this statement it appears that plaintiff has an alarm system for its premises. There is no time frame relative to the presence of the alarm system, other than the fact that it was present at the time Daly signed his declaration. Additionally, the phrase "a culture of confidentiality and secrecy" is vague and ambiguous. There is no showing that any information is "confidential." Daly has not demonstrated any basis upon which he can conclude that others in the industry do not have access to the same information and deal with the same customers and personnel as does Aldrich.

"14. *Moreover, Aldrich Supply Company has a system of shredding documents containing confidential information which are no longer needed.*" Again, without a time frame, other than the present, the court could reasonably conclude that the statement has no relevance as to whether Aldrich attempted to protect the alleged "confidential" information during the time period over which it was allegedly misappropriated.

"15. *Aldrich Supply Company's confidential information was not made privy to all of its employees. Instead, the confidential information was only given to those employees who needed it to perform their job functions. For the most part, the confidential information was imparted only to the sales force, which was almost*

exclusively Richard Hanks and his son, Curt Hanks. Other employees of Aldrich Supply Company, such as truck drivers and fabricators, were not given Aldrich Supply Company's confidential information." Again, there is no foundation for the assertion that anything to which Daly may be alluding is "confidential."

"16. *The design of Aldrich's perforating machine is not known generally throughout the industry and as such gives Aldrich an edge over competitors. This confidential and propriety [sic] information was learned by Defendant Hanks during his employment with Aldrich.*" There is no foundation for these statements. Daly fails to explain the basis for his purported knowledge that the design of Aldrich's perforating machine is not known generally throughout the industry. There is nothing in the record to even suggest he has contact with others in the industry, let alone be able to state what they know and do not know. There is additionally nothing in the record to support an inference that the design of the perforating machine is in any way unique, or that Aldrich has taken steps to protect this "proprietary" information.

"17. *Throughout this litigation, Richard Hanks has produced more than 8,000 pages of documents. Many of those documents are invoices from his company to Aldrich customers. From these, I prepared a detailed listing, by customer, of all invoices, as well as a month-by-month summary, by customer, of the business Hanks has unfairly stolen from Aldrich. Just between January 2002 and June 2003, the amount of business Hanks unfairly stole from Aldrich was almost $2 million.*" Hanks objected on the grounds that the statements are hearsay, lack foundation, are conclusionary, and constitute improper opinion testimony. The trial court properly sustained the objection to these statements.

Initially, the statement that "Hanks has unfairly stolen from Aldrich" is improper opinion (as well as argumentative). The records from which Daly allegedly prepared his listing are hearsay, and there is nothing to show that they come within the business records exception, or any other exception, to the hearsay rule.

"18. *Based upon the most recent financial statement for Aldrich, which is as of December 31, 2004, Aldrich's sales are down approximately $1.5 million from the year ending December 31, 2001 ($4,003,041 to $2,580,031).*" Hanks objected to this statement on the grounds of hearsay and relevance. The statement of Daly is hearsay. Additionally, Daly presents no foundation relative to the business records exception to the hearsay rule. Alternatively, to the extent that the evidence was admissible to show damages and the court erred in excluding it, our conclusion that Hanks has shown that he is entitled to summary judgment because of the failure to show a protectable trade secret or the use of such a trade secret, necessarily renders any error in excluding this error harmless.

"19. *I have personally reviewed the books of Aldrich for its sales during 2001 and 2002 for the customers listed below. The figures listed are accurate amounts of money Aldrich realized in gross sales for the customers and years indicated. This is just a representative sample demonstrating that Richard Hanks and his company have improperly stolen business from Aldrich. There are many more companies which show a similar, and in some cases worse, picture. However in the interest of judicial economy, a sample is provided below*[.]" (The referenced summary is included in Daly's

declaration.) While the records Daly reviewed are apparently those of Aldrich, these statements are subject to the same objections as No. 17, and were appropriately excluded from evidence.

(b) *Declaration of Robert Doty*

Robert Doty declared that he was the head dispatcher for Larry Jacinto Construction, Inc., and that he had worked there for the six years preceding the date of his declaration. He states: "As the head dispatcher of Larry Jacinto Construction, I have the responsibility for ordering products from suppliers for jobs at which Larry Jacinto Construction has been hired to perform services. Larry Jacinto Construction has used Aldrich Supply Company, Inc., as a supplier on jobs for many years. Over these years, I dealt directly with Richard Hanks, who was at that time the President of Aldrich Supply Company. . . . [¶] . . . In early 2002, I was contacted by Mr. Hanks by telephone. Mr. Hanks stated that he had resigned his position as President of Aldrich Supply Company, and had started his own company called American Pipe & Geo-Textiles. During this conversation, Mr. Hanks solicited the business of Larry Jacinto Construction, and requested that we begin purchasing product from Mr. Hanks's new company, instead of purchasing that same product from Aldrich Supply Company."

The following are the portions of Doty's declaration to which objections were sustained, and our evaluation of the court's rulings.

"3. . . . *In ordering products from Aldrich Supply Company, Richard Hanks became familiar with Larry Jacinto Construction's special needs, pricing requirements, job site information, and other details of our business relationship with Aldrich Supply*

Company." We cannot say the trial court abused its discretion in excluding this statement from evidence. The court could reasonably conclude that Doty did not provide an adequate foundation to state that Hanks was familiar with Larry Jacinto Construction's "special needs" and other information. Moreover, the phrases "special needs, pricing requirements, job site information, and other details of our business" are vague and ambiguous.

"5. . . . *We purchased products from Mr. Hanks's new company, due, in part, to his knowledge of the special needs, pricing requirements, job site information and other details about Larry Jacinto Construction's business, which was imparted to him during his employment at Aldrich Supply Company.*" We agree with Hanks that the statement is inadmissible relative to Doty opining as to Hanks's knowledge. Additionally, Doty's foundation provides only that he is the individual that ordered products. Nowhere does his declaration state that he was involved in making decisions about which products to order. Thus there is no foundation that product was ordered due, in part, to Hanks's knowledge.

"6. *I have reviewed our files regarding the documents we have retained concerning the purchased [sic] we made from Mr. Hanks'[s] company, and have located copies of certain invoices--true and correct copies of which are attached collectively hereto a [sic] Exhibit 'A'.*" Hanks interposed a relevance objection. Again, it cannot be said that the trial court abused its discretion in excluding this statement. It would appear that by way of these invoices, Aldrich was attempting to put before the court evidence of its damages. Such evidence would be relevant only if Aldrich otherwise showed it was

entitled to a trial on its claims. For the reasons stated above with respect to paragraph 18 of Daly's declaration, such evidence is either irrelevant or, if relevant, any error in sustaining this objection was necessarily harmless.

(c) *Declaration of Gavin Praejean*

Gavin Praejean is an employee of Aldrich. His declaration states: "On November 7, 2001, I was traveling in a car with Richard Hanks, who was, at that time, the President of Aldrich. Mr. Hanks received a telephone call on his cell phone from his son, Curt Hanks, who was also an employee of Aldrich at the time. I know that it was Curt Hanks on the telephone because Richard Hanks had the volume up on the phone and I could hear his voice. I recognized Curt Hanks'[s] voice based on my working relationship with him."

The following are the portions of Praejean's declaration to which objections were sustained, and our evaluation of the court's rulings.

"2. . . . *I heard Curt Hanks and Richard Hanks discuss the name of a new company which they were forming.*" The trial court could reasonably conclude that the statement lacks foundation as to Praejean's statement that Curt Hanks and Richard Hanks were forming a new company.

"2. . . . *Curt Hanks explained that he had come up with the idea to choose a name which started with the letter 'A.' Curt Hanks explained in the conversation that a company with the letter 'A' would be listed in the phone book at the beginning of the alphabetical listing.*" Hanks objected to these statements on hearsay grounds. We agree with Hanks that the first sentence of the statement is hearsay and was properly excluded.

The second sentence does not appear to be submitted for the truth of the statement therein. The hearsay objection was therefore erroneously sustained as to this portion of the statement.

"2. . . . *I later learned that, prior to his resignation as President of Aldrich, Richard Hanks formed a company named 'American Pipe & Geotextile' which competes with Aldrich.*" Hanks objected to this statement on the grounds that it lacks foundation and is hearsay. Much of the statement is hearsay, and no foundation is provided to show that this witness has knowledge that American Pipe competes with Aldrich. The trial court did not abuse its discretion.

(d) *Declaration of Marc Miles*

Marc Miles declared that he was a member of the law firm representing Aldrich. The primary purpose of this declaration was to place before the court various documents, most of which appear to have been the subject of discovery.

The following are the portions of Miles's declaration to which objections were sustained, and our evaluation of the court's rulings.

"8. *Submitted herewith in the Appendix collectively as Exhibit 26 are true and correct copies of 12 separate solicitation letters from Dick Hanks to several Aldrich Supply Company customers, which Defendant Hanks produced in response to Request for Production of Documents in this litigation.*" Hanks objected to the phrase "to several Aldrich Supply Company customers." Miles's declaration does not provide any foundation for his knowledge that the addressees of the letters are Aldrich customers. The court did not abuse its discretion in sustaining this objection.

"26. *I have obtained from Aldrich Supply Company what Defendant Hanks has referred to as the electronic Rolodex he used during his employment with Aldrich. I have reviewed its contents, as well as the transcription of the data contained therein. Defendant Hanks's Rolodex has the names of companies and contact information, including address and telephone and fax numbers for 581 separate contacts.*" This statement lacks foundation and is hearsay. Miles does not demonstrate any personal knowledge that the Rolodex he is addressing is in fact the same Rolodex that Hanks refers to in his declaration. To the extent he gained information relative to the Rolodex from someone other than Hanks, the statement is based on hearsay.

Defendant also objected to various exhibits which were attached to, or "authenticated" through, the declaration of Attorney Miles. The documents are: (1) exhibit 21, Secretary of State Internet records for various Aldrich customers; (2) exhibit 23, "'a sample of the documents found within the folder labeled profit sharing recaps 4/89 to 12/31/01' produced by Hanks"; (3) exhibit 24, "'sample of the documents contained in a folder labeled memos from Aldrich Supply 10/31/88 to 11/30/01' produced by Hanks"; (4) exhibit 25, "'solicitation letter from Hanks to Signs & Pinnick,' produced by Hanks"; (5) exhibit 26, "'12 separate solicitation letters from Dick Hanks to several Aldrich Supply Company Customers' produced by Hanks"; (6) exhibit 30, "correspondence from Everett Daly to Richard Hanks dated January 14, 2002"; and (7) exhibit 33, "lease (portion only) between Ayala Trust as lessor and American Pipe as [l]essee."

The trial court properly sustained defendant's objections to each of the above exhibits. The Internet documents from the Secretary of State are hearsay with no foundation that they pertain to Aldrich customers. Exhibits 23 and 24 are hearsay with no foundation relative to their authenticity or relevancy. Exhibits 25 and 26 lack foundation and are therefore irrelevant. Exhibits 30 and 33 lack foundation. The court did not abuse its discretion in excluding these documents.

3. Hanks's Initial Burden of Production Relative to Demonstrating the Absence of a Triable Issue of Material Fact

As the moving party, Hanks "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850-851, fns. omitted.) "If plaintiffs respond to comprehensive interrogatories seeking all known facts with boilerplate answers that restate their allegations, or simply provide laundry lists of people and/or documents, the burden of production will almost certainly be shifted to them once defendants move for summary judgment and properly present plaintiffs' factually devoid discovery responses." (*Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 107.)

A trade secret is "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: [¶] (1) Derives independent economic

value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (Civ. Code, § 3426.1, subd. (d).) "As a general principle, the more difficult information is to obtain, and the more time and resources expended by an employer in gathering it, the more likely a court will find such information constitutes a trade secret." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1522.) The identity of customers, along with their specific likes and dislikes, can be protectable trade secrets if gained through the employee's prior employment and used to the former employer's prejudice. (*Continental Car-Na-Var Corp. v. Moseley* (1944) 24 Cal.2d 104, 110-111.) However, "'[a] former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of . . . his former employer, provided such competition is fairly and legally conducted.' [Citations.]" (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1149.) And, "where the customers[,] . . . names appear in directories, and they are so few in number that anyone might readily discover them, it has been held that the employer's list is not secret and confidential information." (*George v. Burdusis* (1942) 21 Cal.2d 153, 159.)

Hanks supported the motion for summary judgment with the assertion that Aldrich had failed to identify any written information constituting a trade secret. In support of this fact, Hanks pointed to Aldrich's interrogatory responses and Aldrich's designation of trade secrets served pursuant to former section 2019 of the Code of Civil Procedure (the trade secret designation). Specifically, interrogatory No. 1 asked, "Describe with

particularity all CONFIDENTIAL INFORMATION as alleged in paragraph 4 of your complaint maintained by Aldrich Supply Co., Inc., ('ALDRICH') at any time while Richard Hanks was employed at ALDRICH . . . ." In response, plaintiff responded: "The confidential information maintained by Aldrich Supply Co., Inc. during the time when Richard Hanks was employed by Aldrich includes the following: Customer names, customer addresses, customer telephone numbers, names of particular individuals who were specific contacts at the client companies, list of particularized clients specializing in the niche market of new residential construction on hills and valleys, fabrication equipment and techniques, including without limitation a specially-designed perforating machine, pricing structure for goods and services, price formulas, profit margins, the specific demands and types of materials, services and products used by Aldrich's clients, the types of materials used by different companies on specific types of projects, contacts who would have information concerning prospective jobs that clients would have in the future, specific vendor information, accounting processes and marketing and selling techniques, and job site information."

Aldrich's trade secret designation set forth the following list of allegedly misappropriated trade secrets: "(1) Customer contact information, including but not limited to the name, address, telephone number, email address, of Plaintiff's customers including [certain specified customers]; (2) Plaintiff's pricing information and methodologies for its customers; (3) sales history data for Plaintiff's customers concerning their transactions with Plaintiff; (4) invoices and invoice history data for

Plaintiff's customers concerning their transactions with Plaintiff; and (5) special requirements for Plaintiff's customers."[3]

Hanks further submitted the following facts in his declaration: (1) Hanks has been employed in the underground pipe industry since 1966; (2) Hanks was first employed by Aldrich in 1977; (3) Through his prior customer contacts in the pipe industry, Hanks developed Aldrich's underground pipe division; (4) Hanks tendered his written resignation of employment on November 30, 2001; (5) Hanks's company, American Pipe, is a competitor of Aldrich; (6) Hanks did not take any information or copies of material when he left Aldrich's employ; (7) Hanks has never possessed a customer list or contact information relative to customers of Aldrich; (8) Hanks did not take any pricing information or formulas when he left Aldrich; (9) Hanks knows of no "special requirements" or pricing methodologies of Aldrich customers; (10) The only information Hanks has concerning Aldrich customers is information that he carries in his head and has accumulated over 40 years in the industry; (11) Aldrich does not have any written formulas or pricing information; (12) The criteria for any particular job is based on the

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[3] Aldrich argues that reliance upon the trade secret designation as evidence in a summary judgment motion is improper. Aldrich contends that the trade secret designation is not a discovery device, but merely prohibits a plaintiff in a trade secret case from conducting discovery until the plaintiff provides the required statement to the defendant. We need not decide whether a party moving for summary judgment can rely upon the designation served pursuant to Code of Civil Procedure section 2019 because here Aldrich agreed in its opposition separate statement that the list of alleged misappropriated trade secrets was undisputed. Moreover, Aldrich did not object to Hanks's use of the document in the trial court. Aldrich has thus forfeited this argument on appeal.

specification of materials made by the customer and the project's architects, engineers, and contractors; (13) Each job depends on the job specifications and not some special requirement of a given customer; (14) There are two industry publications, each of which American Pipe subscribes to; (15) Hanks used these publications to obtain contact information about prospective customers, as well as to identify jobs upon which to bid and solicit prospective customers; (16) Hanks did not use any trade secret information of Aldrich in soliciting business for American Pipe; (17) There is nothing confidential or proprietary about the perforating machine used by Aldrich; (18) Hanks designed his own perforating machine which is entirely different than that used by Aldrich; and (19) American Pipe has not used any confidential information of Aldrich in its competition with Aldrich.

Aldrich's vague and factually devoid discovery responses and the agreed-upon list of allegedly misappropriated trade secrets, together with the affirmative evidence in Hanks's declaration, amply support Hanks's burden of showing that Aldrich's alleged customer list and other information did not constitute trade secrets. Even if such information constituted a protectable trade secret, Hanks's declaration provides evidence that he did not misappropriate such information. Hanks made a sufficient showing to shift the burden of production to Aldrich to demonstrate a triable issue of fact.

4. Aldrich's Burden of Production

A plaintiff opposing a motion for summary judgment "must 'set forth the specific facts showing that a triable issue of material facts exists . . . .'" (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 860, quoting Code Civ. Proc., § 437c, subd. (o)(2).)

The specific facts must be based upon admissible evidence; opposing declarations must be based upon personal knowledge and "cite evidentiary facts, not legal conclusions or 'ultimate' facts. [Citation.]" (*Guthrey v. State of California, supra,* 63 Cal.App.4th at pp. 1119-1120.)

Aldrich produced no competent evidence of specific facts that any of the information allegedly misappropriated was a trade secret. To constitute a trade secret, the information must "not be[] generally known to the public or to other persons who can obtain economic value from its disclosure or use." (Civ. Code, § 3426.1, subd. (d)(1).) There are no evidentiary facts to raise a triable issue that Aldrich's customer contacts, "special requirements," or any other of the alleged "confidential" information is not known to other companies within the industry. Throughout his declaration, Daly refers to all of the information as being "confidential." This conclusory statement is unsupported by evidentiary facts. No foundation is set forth demonstrating Daly's knowledge that the identity of Aldrich's customers are not generally known to other companies "who can obtain economic value" from the disclosure. Similarly, there are no evidentiary facts as to the nature of Aldrich's pricing formulas or that the same method is not used by others in the same or similar business. Simply stated, there is no admissible evidence to support a triable issue that any of the information identified by Daly as "confidential" is indeed a protected trade secret.

Additionally, Aldrich has failed to present any competent evidence that the alleged confidential information was "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (Civ. Code, § 3426.1, subd. (d)(2).) There is no

admissible evidence in any of the declarations that at the time Hanks worked for Aldrich there existed any efforts to protect the secrecy of anything. And, even if the excluded portions of Daly's declaration had been allowed into evidence, his statements still provide no facts as to how an alarm system or the shredding of miscellaneous documents protected the secrecy of customers' identities or special pricing formulas.

In short, essential statements and documents that Aldrich placed before the trial court lacked evidentiary value. Aldrich failed to produce sufficient admissible evidence of a triable issue of fact that the information it identified as trade secrets are, in fact, trade secrets, or that Hanks misappropriated such information. Accordingly, the motion for summary judgment was properly granted.

B. *Hanks's Motion for Attorney Fees*

Following the entry of judgment, Hanks filed a motion for an award of his attorney fees based upon an attorney fees provision in his employment contract with Aldrich. This provision states: "In the event suit be brought because of the breach of any of the terms of this Agreement, the losing party shall pay to the prevailing party a reasonable attorney's fee which shall be fixed by the court." Hanks argued that, although the complaint did not include a cause of action for breach of contract, Aldrich did sue him "*because* of the breach" of the "Non-Disclosure; Non-Competition" provisions in the agreement.

In support of the motion, Hanks relied upon certain responses by Aldrich to interrogatories. In particular, Hanks pointed to the following response to an interrogatory seeking the facts upon which Aldrich based the allegation that Hanks misappropriated

confidential information: "On May 5, 1987, Richard Hanks executed an Employment Agreement whereby he agreed that . . . he would not disclose any of the confidential information he learned or acquired as a result of his employment with Aldrich Supply Company. Despite this agreement, prior to Richard Hanks leaving his employment with Aldrich Supply Company, he planned and schemed to set up a competing business."

Hanks also relied upon certain statements Aldrich made in its separate statement filed in opposition to the motion for summary judgment. In one item, Aldrich stated: "The customer information for the core base of Aldrich's customers is an extremely valuable asset to Aldrich. As such, I have taken steps over the years to ensure its secrecy. When I acquired the company in 1987, I had Richard Hanks (the person most knowledgeable regarding Aldrich's customer information) sign an Employment Agreement, wherein he recognized the value of this information, recognized its confidentiality and agreed to be prohibited from disclosing any confidential information during or following his employment." A second item relied upon by Hanks states: "On or about May 5, 1997, Defendant Hanks executed an employment agreement, wherein he agreed in writing to maintain the confidentiality of Aldrich Supply Company's customer information."

Hanks argued that Aldrich's interrogatory responses and the statements made in the opposing separate statement "demonstrate that Aldrich viewed Hanks'[s] alleged misappropriation of trade secrets as a breach of his employment agreement. In other words, Aldrich's lawsuit was brought *because of* Hanks'[s] alleged breach of the non-disclosure and non-competition clauses in his employment agreement."

In opposing the motion, Aldrich argued that its lawsuit was based entirely upon tort theories and that the complaint "is entirely devoid of any mention of either the 1987 Contract or the Non-Disclosure clause." With respect to the interrogatory responses and statements in Aldrich's opposition separate statement relied upon by Hanks, Aldrich argued that these responses and statements merely demonstrate that Hanks knew Aldrich intended to keep certain property confidential and took steps to secure the secrecy of its trade secrets.

Following a hearing, the court denied the motion. The court explained: "The issue for factual determination is whether this suit was brought 'because of the breach of any of the terms of the Agreement.' The court concludes that it was not. . . . [T]he attorney's fee clause here is not as broad as those which provide for attorney's fees in an action 'arising out of' the contractual relationship. Aldrich correctly contends that its complaint includes no cause of action for breach of contract. The action does, however, arise out of the employment relationship established by the contract. [¶] Although its discovery responses may have been somewhat ambiguous on the point, by the time of the motion for summary judgment, Aldrich clearly made no contention that subparagraph (b) of Paragraph 9 of the draft agreement was a part of the final agreement. Aldrich contends that the sole use to which it put evidence of Paragraph 9 was to show its efforts to maintain the confidentiality of its trade secrets. Hanks has not shown that, with the possible exception of ambiguous discovery responses, Aldrich's counsel made any argument, written or oral, contending that Hanks breached the contract. [¶] The court

finds, therefore, that this action was not brought because of the breach of any of the terms of the employment agreement."

1. Standard of Review

The parties dispute the applicable standard of appellate review. The standard of review involved in an appeal of a ruling on a motion for attorney fees depends upon the nature of the issues. (See *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.) The denial of a motion for attorney fees based upon a determination that there was no prevailing party, for example, is reviewed for an abuse of discretion. (*McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn.* (1991) 231 Cal.App.3d 1450, 1456; *Harvard Investment Co. v. Gap Stores, Inc.* (1984) 156 Cal.App.3d 704, 715.) The trial court's determination of the amount of recoverable fees is also reviewed for an abuse of discretion. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095; *Honey Baked Hams, Inc. v. Dickens* (1995) 37 Cal.App.4th 421, 429, disapproved on other grounds in *Santisas v. Goodin* (1998) 17 Cal.4th 599, 614 & fn. 8.)

However, when the appeal challenges the legal basis for a ruling on a motion for attorney fees, or the appeal raises only pure issues of law, we review the ruling de novo. (*Leamon v. Krajkiewcz* (2003) 107 Cal.App.4th 424, 431; *Snyder v. Marcus & Millichap* (1996) 46 Cal.App.4th 1099, 1102.) Thus, when the facts are not in dispute and the right to the recovery of fees depends upon the interpretation of a contract and no extrinsic evidence is offered to interpret the contract, we review the ruling de novo. (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 705.)

Here, the resolution of Hanks's attorney fee motion involved a mixed question of law and fact -- whether Aldrich sued Hanks "because of the breach of any of the terms of" the 1987 employment agreement within the meaning of that agreement. The interpretation of the contract is essentially a legal question, which we review de novo. (*Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1180.) Factual determinations by the trial court "are reviewed by giving deference to the trial court's decision." (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800.) If the court correctly construed the contract, its application of the contract language to the facts is essentially a factual inquiry, which we review for substantial evidence. (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1128.)

2. The Interpretation of the Attorney Fees Clause

"'Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. [Citation.] Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.] The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" [citation], controls judicial interpretation. [Citation.] Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning. [Citations.]'" (*Santisas v. Goodin, supra,* 17 Cal.4th at p. 608.)

Here, the attorney fees clause permits the recovery of fees when suit is "brought because of the breach of any of the terms of this Agreement." The phrase, "because of the breach," indicates a causal relationship between a breach of the agreement and the

filing of the lawsuit. Because a causal relationship between a breach of the agreement and the filing of the lawsuit necessarily implies the existence of a breach of the agreement, there is arguably no basis for the recovery of fees unless Hanks proves there was a breach of the agreement, as well as the required causal relationship. Perhaps anticipating this argument, Hanks asserts that fees are recoverable when the suit is brought because of an *alleged* breach of the agreement. The argument, however, is not asserted by Aldrich; nor does Aldrich challenge this point. For purposes of our analysis, we will assume that the contract permits recovery of fees when the action is brought because of an actual or alleged breach of the agreement.

Here, Aldrich's complaint did not allege a breach of the agreement. Nevertheless, we agree with Hanks that the "contract language focuses on the underlying reason for the suit . . . rather than the particular form of the cause of action . . . ." Fees may thus be recoverable under the clause if the complaint does not assert a breach of contract, as long as the action was filed *because of* a breach (or alleged breach) of the agreement. As Hanks argues, an action can be brought "*by reason of* a breach of contract without being an action *for* breach of contract." For example, Daly (as Aldrich's owner) could have determined that Hanks breached the terms of the employment agreement and, based on that determination, decided to initiate Aldrich's suit against Hanks. If Aldrich ultimately elects to pursue only tort claims against Hanks, the lawsuit could nevertheless be said to have been "brought because of the breach" of the employment agreement.

Although the language of the attorney fees clause would thus permit the recovery of fees for an action asserting only tort theories under such circumstances, we agree with

the trial court that language of the clause "is not as broad as those which provide for attorney's fees in an action 'arising out of' the contractual relationship." In *Santisas*, for example, a real estate purchase and sale agreement provided: "'In the event legal action is instituted by the Broker(s), or any party to this agreement, or *arising out of the execution of this agreement or the sale*, or to collect commissions, the prevailing party shall be entitled to receive from the other party a reasonable attorney fee to be determined by the court in which such action is brought.'" (*Santisas v. Goodin, supra,* 17 Cal.4th at p. 603, italics added.) The court held that this language "embraces all claims, both tort and breach of contract, in plaintiffs' complaint, because all are claims 'arising out of the execution of th[e] agreement or the sale.' [Citation.]" (*Id*. at p. 608.)

In addition to *Santisas*, Hanks relies upon *Johnson v. Siegel* (2000) 84 Cal.App.4th 1087, *Lerner v. Ward* (1993) 13 Cal.App.4th 155, and *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338. In *Xuereb*, a real estate purchase and sale agreement provided for the recovery of fees if "this Agreement gives rise to a lawsuit or other legal proceeding . . . ." (*Id.* at p. 1340.) The court stated that the phrase "gives rise to" must be understood "in a far more general, transactional sense than is suggested by phrases such as 'derives from' or 'proximately caused by.'" (*Id*. at p. 1344.) The phrase, the court concluded, "must be interpreted expansively, to encompass acts and omissions occurring in connection with the Purchase Agreement and the entire transaction of which it was the written memorandum." (*Ibid*.)

In *Lerner*, a real estate purchase and sale agreement provided that attorney fees were recoverable by "the prevailing party '[i]n any action or proceeding arising out of

this agreement . . . .'" (*Lerner v. Ward, supra,* 13 Cal.App.4th at pp. 158-159.) Relying on *Xuereb*, the court held that this language encompassed a claim that "the Wards, through their fraudulent representations, induced the Lerners to enter into an agreement to purchase the property." (*Lerner v. Ward, supra,* at p. 160.) The "tort cause of action arose out of the written agreement." (*Ibid*.)

In *Johnson*, an attorney fee provision providing for the recovery of fees in an action "*arising out of this Agreement*" was similarly interpreted to apply "to both tort and contract causes of action arising out of the real estate transaction." (*Johnson v. Siegel, supra,* 84 Cal.App.4th at p. 1101.)

The language in the Hanks-Aldrich employment agreement differs from the attorney fees provisions in these cases in two material respects. First, rather than refer to actions that "*arise out of*" the employment agreement, the agreement uses the phrase "*because of*" the breach of the agreement. As the *Xuereb* court explained, the phrase "arising out of" suggests more than a causal relationship; rather it refers to acts and omissions occurring *in connection with* the agreement and the transaction.

Second, the attorney fees provisions in the cases relied upon by Hanks permitted recovery of fees when the claim arises out of *the agreement*. By contrast, the actions for which recovery is permitted under the attorney fees clause here is limited to actions brought because of the *breach of the terms of the agreement*. If the provision applied to actions brought because of the agreement, a causal connection could be traced from the agreement to the employment relationship to the acts alleged in Aldrich's complaint. However, under the language of the attorney fees provision, it is not enough that the

action was brought because of the employment relationship created by *the agreement*; the action must be brought because of *a breach* of the agreement.

Because of these critical differences between the language in the attorney fees provision in this case and the provisions in the cases cited by Hanks, the trial court could conclude (as it did) that while the lawsuit arose out of the employment relationship established by the contract, it was not brought because of a breach of the terms of the agreement. It thus appeared that the trial court correctly interpreted the attorney fees provision of the agreement.

3. The Court's Factual Determination That the Lawsuit Was Not Brought Because of Any of the Terms of the Employment Agreement

The trial court's "factual determination" that the lawsuit was not brought because of the breach of any of the terms of the agreement is supported by substantial evidence. Significantly, the complaint filed by Aldrich did not allege that Hanks breached any term of the employment agreement. As explained above, the absence of a count for breach of contract is not by itself determinative of Hanks's right to recover fees. However, the absence of a breach of contract claim nevertheless carries substantial weight in evaluating the reason for bringing the suit; if the suit was brought because of a breach of a term of the agreement, we would reasonably expect the suit to include a count for breach of contract.

Hanks, who had the burden of proving that Aldrich brought the action because of the breach of the employment agreement (see Code Civ. Proc., § 1033.5, subd. (c)(5)), proffered interrogatory responses and statements made by Aldrich in opposition to the

motion for summary judgment. At most, these responses and statements suggest that Aldrich believed that Hanks acted contrary to the agreement. However, the responses and statements do not establish that Aldrich, even if it believed that a breach occurred, brought the action *because of* such breach. Certainly the trial court, as the factfinder, could reasonably conclude that these responses and statements were insufficient to satisfy Hanks's burden on the motion. Accordingly, the order denying the motion for attorney fees is affirmed.

DISPOSITION

The judgment is affirmed. Each party shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ Richli
Acting P.J.

/s/ Miller
J.